

No. 10,991

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE J. BUZAS,

Appellant,

VS.

PETER CASSENOS and JOSEPH P. MOORE,

Sheriff of the County of Napa, State
of California,

Appellees.

APPELLANT'S OPENING BRIEF:

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FILED

MAY 11 1945

PAUL P. O'BRIEN,
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Appellees.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant was adjudged a bankrupt on April 4, 1941 (T. 19-20), and on November 18, 1941, he was given his discharge (T. 20-21). On February 15, 1944, he filed with the District Court which had discharged him a petition to restrain the appellees from enforcing a judgment reflecting a claim from which he had been released by said discharge, and to obtain a turnover order of moneys collected through execution on the judgment. (T. 21-27.) Jurisdiction of the District Court is therefore sustained by section 262 of the Judicial Code (28 U.S.C.A., sec. 377), and section 2 (15) of the Bankruptcy Act (11 U.S.C.A., sec. 13 (15)).

The final order of the District Court was made on October 19, 1944, denying the petition, dissolving temporary restraining order which had been issued, and denying a turnover order. (T. 60-66.) Notice of appeal was filed November 29, 1944. (T. 66-67.) Jurisdiction of this court upon appeal to review the said order is therefore sustained by section 128 of the Judicial Code (28 U.S.C.A., sec. 225), and section 24, subdivisions a and b, of the Bankruptcy Act (11 U.S.C.A., sec. 47, subds. a, b).

STATEMENT OF THE CASE.

Appellant George Buzas filed a voluntary petition in bankruptcy and was adjudged a bankrupt on April 4, 1941. (T. 19-20.) In his schedules, subscribed and sworn to on March 26, 1941, he listed a claim of appellee Peter Cassenos, as follows (T. 6):

“Peter Cassenos, Napa Road, Vallejo, Calif., claim for damages: Note: Said Cassenos filed suit December 7, 1940, in the Superior Court of Napa County for said amount, but to date has not taken default or had judgment entered in said action.....\$900.00”.

The complaint in the action thus referred to sought treble damages upon allegations that the defendant (appellant Buzas) had “forcibly and unlawfully” entered real property whereof plaintiff (appellee Cassenos) was in possession, and driven “a truck over the growing vines and crop of tomatoes injuring and damaging same in the sum of \$300.00”. (T. 31-32.)

There was no allegation in the complaint that the injury was “willful and malicious”. Judgment on the default of the defendant had been entered for the sum of \$900 on March 8, 1941, but execution had not been issued thereon at the time appellant filed his schedules and was adjudged a bankrupt. (T. 23.)

Appellant received his discharge in bankruptcy on November 18, 1941. (T. 20-21.) Ten months later, execution on the judgment was issued and levied. (T. 23, 33-34.) Proceedings were stayed by the state court, and on February 10, 1943, the state court vacated the judgment of March 8, 1941. (T. 24.) A new judgment for \$900 was entered in the action on April 22, 1943, wherein it was recited for the first time that the defendant “did willfully and maliciously injure the said property”. (T. 44-45.) Execution thereon was issued in April, 1943, and levied, and upon sale of appellant’s property thereunder in September and October, 1943, the sum of \$1080.20 came into the possession of the appellee Joseph Moore and his predecessor John Steckter, as sheriff of the County of Napa. (T. 24-25, 35-42.) All but the sum of \$330.20 thereof had been paid to the appellee Cassenos at the time appellant filed his petition herein.

The appellant filed his petition in the District Court on February 15, 1944, to restrain the enforcement of said judgment on the ground that it reflected a claim from which the appellant had been released by his discharge in bankruptcy on November 18, 1941, and to obtain a turnover to the appellant of the said sum of \$1080.20 collected under execution upon the judg-

ment. (T. 21-27.) He alleged in the petition that he had leased property to the appellee Cassenos and had reentered the premises on November 16, 1940, "believing in good faith that said term had ended", and that the entry was not "wrongful, nor intentionally done in willful or any disregard of petitioner's duty in the premises, but in accordance with the aforesaid right of re-entry". (T. 22.) An order to show cause and temporary restraining order directed against both appellees was issued by the District Court on February 15, 1944. (T. 28-30.) *Neither appellee filed an answer to the petition.* At the hearing it appeared that of the said sum of \$1080.20, the appellee Cassenos had received \$750 (T. 41-42) and \$330.20 was in the possession of the appellee sheriff (T. 49-50).

On November 28, 1944, the District Court made its order denying the petition, dissolving the temporary restraining order, and denying the turnover order. (T. 60-66.) This ruling was placed on the ground that the claim of appellee Cassenos was for a willful and malicious injury to property and was not released by the discharge in bankruptcy. (T. 65.) And this ruling raises the questions involved on the appeal, namely: 1. Did the District Court err in ruling that the discharge in bankruptcy did not constitute a bar to the claim of appellee Cassenos? 2. Was the bankrupt entitled to a turnover order?

SPECIFICATION OF ERRORS.

1. The District Court erred in finding that the claim of appellee Cassenos was one for a willful and malicious injury to property, for the reason that the evidence established the contrary as a matter of law.

2. The District Court erred in finding that the discharge in bankruptcy did not constitute a bar to the claim of appellee Cassenos, for the reason that the evidence established the contrary as a matter of law.

3. The District Court erred in denying the petition to enjoin enforcement of the claim of appellee Cassenos, for the reason that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim.

4. The District Court erred in dissolving the temporary restraining order, for the reason that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim of appellee Cassenos.

5. The District Court erred in denying a turnover order against the appellee Cassenos, for the reason that the evidence established as a matter of law that said appellee had received the sum of \$750 by enforcing a claim from which appellant had been released by a discharge in bankruptcy.

6. The District Court erred in denying a turnover order against the appellee Moore, for the reason that the evidence established as a matter of law that said appellee, as sheriff, had received and was in possession

of the sum of \$330.20 through enforcement by appellee Cassenos of a claim from which appellant had been released by a discharge in bankruptcy.

ARGUMENT OF THE CASE.

Summary of Argument.

The facts stated in the petition stand admitted by the failure of the appellees to deny them. The Cassenos claim was provable in bankruptcy. It was not a claim for willful and malicious injury to property. The claim was listed in the schedules of the bankrupt, and he was released therefrom by his discharge in bankruptcy. The District Court therefore erred in making findings to the contrary. Although the discharge constituted a bar to the claim of appellee Cassenos, such appellee nevertheless attempted to enforce the judgment to which the claim had been reduced. He caused execution to be issued on the judgment. He caused levy thereunder to be made on appellant's property. And he caused the property thus levied upon to be sold to satisfy the judgment. The District Court therefore erred in denying the petition to enjoin enforcement of the claim and in dissolving the temporary restraining order it had issued. Through enforcement of the released claim the appellee Cassenos had received the sum of \$750, and a further sum of \$330.20 had been received by the appellee sheriff but had not been disbursed to Cassenos. The District Court therefore erred in refusing to make a turnover order against the appellees and each of them. The order of

the District Court should be reversed with directions to enter an order permanently enjoining the enforcement of the Cassenos claim and ordering appellees to turn over to appellant the respective sums of \$750 and \$330.20.

1. SPECIFICATION OF ERROR NO. 1. THE DISTRICT COURT ERRED IN FINDING THAT THE CLAIM OF APPELLEE CASSENOS WAS ONE FOR A WILLFUL AND MALICIOUS INJURY TO PROPERTY, FOR THE REASON THAT THE EVIDENCE ESTABLISHED THE CONTRARY AS A MATTER OF LAW. |

This was designated as point 4 in appellant's Statement of Points on Appeal. (T. 76.)

In his petition, the appellant alleged the following respecting the claim of appellee Cassenos and the action in which the claim was reduced to judgment:

"That said Superior Court action is one for treble damages based upon an alleged forcible entry and unlawful entry by petitioner upon real property, which by an agreement in writing, was leased to said creditor by petitioner on or about December 18, 1939, at the approximate annual rental of \$70.00, the term of which was to end approximately October 15 to November 15, 1940; that petitioner believing in good faith that said term had ended, took over said real property on November 16, 1940, by right of re-entry, all in accordance with and pursuant to the terms and provisions of said agreement in writing, as aforesaid; that the damages allegedly claimed by said creditor is alleged to be treble damages in the sum of \$900.00; that petitioner's entry upon said real property, was not, in and of itself, wrongful, or

intentionally done in willful or any disregard of petitioner's duty in the premises, but in accordance with the aforesaid right of re-entry." (T. 22.)

No answer to the petition was filed by the appellees or either of them. As the Rules of Federal Civil Procedure apply to Bankruptcy cases (General Order No. 37, 11 U.S.C.A., fol. sec. 53), the foregoing allegations stand admitted by the appellees (Rule 8, subd. (a), Federal Rules of Civil Procedure, 28 U.S.C.A., fol. sec. 723c). Consequently, on the record before this court the evidence establishes as a matter of law that the claim of appellee Cassenos was not one for a willful and malicious injury to property.

Moreover, the complaint in the superior court action did not allege a willful and malicious injury to property. It is true that the complaint alleged that the defendant "forcibly and unlawfully entered in and upon" real property. (T. 31.) But the complaint did not state an action for "forcible entry" under the California Code of Civil Procedure, *for it did not seek the restitution of real property.* In California an action for "forcible entry" is a summary proceeding for obtaining possession of real property. It will not lie for a mere trespass. (*Castro v. Tewksbury*, 69 Cal. 562, 568.) And unless the plaintiff in an action for "forcible entry" recovers possession of real property, he cannot recover damages for a "forcible entry". (*Brawley v. Risdon Iron Works*, 38 Cal. 676, 677-78; *Edwards v. Bodkin*, 43 Cal. App. 405, 407.) The gov-

erning section of the California Code of Civil Procedure read as follows in pertinent parts:

Section 1159. "Every person is guilty of a forcible entry who either—

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstances of terror enters upon or into any real property; or,

2. Who, after entering peaceably upon any real property, turns out by force, threats, or menacing conduct, the party in possession."

Section 1166. "The plaintiff, in his complaint, which shall be verified, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry * * *, and claim damages therefor."

Section 1174. "If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; * * *

The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, * * * Judgment against the defendant guilty of the forcible entry, * * * may be entered in the discretion of the court either for the amount of the damages * * *, or for three times the amount so found."

The complaint, obviously, did not state a cause of action for "forcible entry". The next inquiry, then,

is what sort of action did it state. When analyzed the substance of the complaint was that defendant “forcibly and unlawfully” “drove a truck over the growing vines and crop of tomatoes injuring and damaging the same in the sum of \$300.00”. (T. 31-32.) Growing crops are regarded as personal property in California. (*Gordon v. G. M. H. Wagner & Sons*, 207 Cal. 373, 378, 278 P. 863; *Campbell v. Sutton*, 62 Cal. App. 2d 621, 624-25, 145 P. 2d 91.) Therefore the cause of action was one for injury to personal property. Neither the word “unlawful” nor the word “forcible” connotes “willful and malicious”. (*Shelby v. Houston*, 38 Cal. 410, 422; *People v. Casagrande*, 43 Cal. App. 2d 818, 822; *People v. Simmons*, 12 Cal. App. 2d 329.) Nothing in the complaint, therefore, is opposed to the previously quoted allegations of the petition herein (admitted by the appellees) that the claim of appellee Cassenos was not one for willful and malicious injury to property. Such was the status of the claim when appellant was given his discharge in bankruptcy on November 18, 1941. (T. 20-21.) Seventeen months later appellee Cassenos obtained a judgment stating for the first time that the defendant (appellant) “did wilfully and maliciously injure the said property of the plaintiff”. (T. 44-45.) It has been held that a change of the apparent theory of a claim without notice to a bankrupt, must be disregarded. (*In re Tillery*, D.C.Ga., 16 F. Supp. 877, 878.)

Enough has been said to demonstrate that the evidence established as a matter of law that the claim of appellee Cassenos was not one for a willful and mali-

cious injury to property, and that the finding of the District Court to the contrary (T. 65) cannot be sustained.

2. SPECIFICATION OF ERROR NO. 2. THE DISTRICT COURT ERRED IN FINDING THAT THE DISCHARGE IN BANKRUPTCY DID NOT CONSTITUTE A BAR TO THE CLAIM OF APPELLEE CASSENOS, FOR THE REASON THAT THE EVIDENCE ESTABLISHED THE CONTRARY AS A MATTER OF LAW.

This was designated as point 3 in appellant's Statement of Points on Appeal. (T. 76.) The District Court found:

"The judgment awarding respondent treble damages for a willful and malicious injury to property was fully supported by the allegations of the complaint upon which it was based; and it has not been rendered ineffective because of the decree of final discharge granted to petitioner." (T. 65.)

Section 17, subdivision a, of the Bankruptcy Act (11 U.S.C.A., sec. 35, subd. a) provides in pertinent part as follows:

"a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (2) are liabilities * * * for willful and malicious injuries to the person or property of another * * *."

In the preceding subdivision it was demonstrated that the claim of appellee Cassenos was not one for willful and malicious injury to property. The remain-

ing question is whether the claim was a “provable debt”. “Provable debts”, so far as pertinent to this case, are defined in section 63, subdivision a, of the Bankruptcy Act (11 U.S.C.A., sec. 103, subd. a), as follows:

“a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, * * * (4) * * * a contract express or implied; * * *.”

That the claim of appellee Cassenos was a “provable debt”, as above defined, cannot be doubted. At the time appellant filed his petition in bankruptcy, the claim had been reduced to judgment dated March 8, 1941. (T. 23.) It was therefore provable under subdivision a (1), above quoted. And even if the judgment had been void on its face (which the record does not show), it would have been competent for said appellee to waive the tort, and prove his claim under subdivision a (4), above quoted, on “implied contract”. (*Davis v. Aetna Acceptance Co.*, 293 U.S. 228, 231, 55 S.Ct. 151, 153.)

It therefore follows that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim of appellee Cassenos, and the court erred in finding the contrary.

3. SPECIFICATION OF ERROR NO. 3. THE DISTRICT COURT ERRED IN DENYING THE PETITION TO ENJOIN ENFORCEMENT OF THE CLAIM OF APPELLEE CASSENOS, FOR THE REASON THAT THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT THE DISCHARGE IN BANKRUPTCY CONSTITUTED A BAR TO THE CLAIM.

This was designated as point 1 in appellant's Statement of Points on Appeal. (T. 76.)

In *Holmes v. Rowe*, 9 Cir., 97 F. 2d 537, this court decided that District Courts had plenary jurisdiction to grant the relief sought by the petition in the present case. It was there said, at pages 538 and 539:

(538) "The main contention of appellant is that the order of the District Court granting the injunction is erroneous, in that the (539) Court did not have jurisdiction of the subject-matter involved in said petitions, because of the fact that neither the petitions, nor the evidence, disclosed that the bankrupt had exhausted his remedies in the state courts so as to enable him to come into the Federal Court.

With this contention of appellant we do not agree. A review of the decisions discloses that a Federal District Court, once having obtained jurisdiction of a controversy, and having rendered a decision in the matter, has complete power to protect the judgment or decree which it has rendered and may go so far as to enjoin an action entertained in the state court by a litigant, involving the same subject-matter, when such action may in some way interfere with, or nullify the effect of said judicial determination. So here, the Court having discharged the appellee in bankruptcy, still retained sufficient jurisdiction to

grant an injunction restraining appellant from levying execution upon a judgment rendered in his favor by the state court against the appellee upon a claim adjudicated in the bankruptcy court.”

Since it appeared in this case that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim which appellee Cassenos was enforcing and the appellee Moore was furthering, it was manifest error on the part of the District Court to deny appellant’s petition to enjoin such acts and conduct on the part of the appellees.

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4. SPECIFICATION OF ERROR NO. 4. THE DISTRICT COURT ERRED IN DISSOLVING THE TEMPORARY RESTRAINING ORDER, FOR THE REASON THAT THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT THE DISCHARGE IN BANKRUPTCY CONSTITUTED A BAR TO THE CLAIM OF APPELLEE CASSENOS.

What was said in the preceding subdivision is equally applicable here. Separate statement is here made because Rule 20, subdivision (d), of this Court, requires such separate statement. Under the circumstances of the case, it was the manifest duty of the District Court to grant appellant a permanent injunction. It was plain error for the court to dissolve the temporary restraining order.

5. SPECIFICATION OF ERROR NO. 5. THE DISTRICT COURT ERRED IN DENYING A TURNOVER ORDER AGAINST THE APPELLEE CASSENOS, FOR THE REASON THAT THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT SAID APPELLEE HAD RECEIVED THE SUM OF \$750 BY ENFORCING A CLAIM FROM WHICH APPELLANT HAD BEEN RELEASED BY A DISCHARGE IN BANKRUPTCY.

This was designated as point 1 in appellant's Statement of Points on Appeal. (T. 76.)

The undisputed evidence showed that appellee Cassenos had received the sum of \$750 by enforcing the claim from which appellant had been released by his discharge in bankruptcy. The undersheriff of Napa County testified that as the result of execution, levy, and sale under the judgment which Cassenos recovered against appellant, the sums of \$600 and \$150 had been paid to appellee Cassenos. (T. 50-55.) He produced two receipts which were admitted in evidence. One showed payment to and receipt by appellee Cassenos of the sum of \$600 on September 21, 1943 (T. 42); the other showed payment to and receipt by appellee Cassenos of the sum of \$150 on October 1, 1943 (T. 40-41). A proper exercise of the power defined by this court in *Holmes v. Rowe*, 9 Cir., 97 F. 2d 532, demanded that the District Court order appellee Cassenos to turn over said sum of \$750 to appellant. The court erred in refusing to make such turnover order.

6. SPECIFICATION OF ERROR NO. 6. THE DISTRICT COURT ERRED IN DENYING A TURNOVER ORDER AGAINST THE APPELLEE MOORE, FOR THE REASON THAT THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT SAID APPELLEE, AS SHERIFF, HAD RECEIVED AND WAS IN POSSESSION OF THE SUM OF \$330.20 THROUGH ENFORCEMENT BY APPELLEE CASSENOS OF A CLAIM FROM WHICH APPELLANT HAD BEEN RELEASED BY A DISCHARGE IN BANKRUPTCY.

This was designated as point 1 in appellant's Statement of Points on Appeal. (T. 76.)

Additional undisputed testimony of the said undersheriff showed that as the result of execution, levy, and sale under said judgment, a further sum of \$330.20 came into the possession of appellee Moore, as sheriff, on September 21, 1943. (T. 49.) He claimed that costs in the sum of \$61.05 had been disbursed, leaving a balance in his possession of \$269.15. (T. 49-50.) This sum had not been paid to appellee Cassenos. (T. 50.) Appellant repeats, a proper exercise of the power defined by this court in *Holmes v. Rowe*, 9 Cir., 97 F. 2d 532, demanded that the District Court order appellee Moore to turn over the sum of \$330.20 to appellant. The appellee Cassenos, not the appellant, should be required to reimburse the sheriff for any costs disbursed. The court erred in refusing to make such turnover order.

CONCLUSION.

Appellant therefore respectfully submits that the order of the District Court should be reversed with directions to said court to enter an order permanently enjoining the enforcement of the Cassenos claim and ordering appellees to turn over to appellant the respective sums of \$750 and \$330.20.

Dated, San Francisco,
May 11, 1945.

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